Supreme Court, U. S.
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No. 73-1363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

J. WEINGARTEN, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR J. WEINGARTEN, INC. IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-7A) is reported at 485 F.2d 1135. The Board's decision and order are reported at 202 NLRB No. 69 (Pet. App. C, pp. 9A-30A).

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1973, and the Board's time for filing a petition for writ of certiorari was extended by Mr. Justice Powell

to and including March 8, 1974. This court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court below properly determined that it is not an unfair labor practice for an employer to refuse an employee's request for the presence of her union representative at an investigatory interview with the employer.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at p. 2.

STATEMENT

Following the Board's decision (with two members dissenting) that respondent, J. Weingarten, Inc. (the Company), violated Section 8(a)(1) of the National Labor Relations Act, as amended, in refusing the request of its employee, Leura Collins, for the presence of her union representative at an investigatory interview (Pet. App. C, pp. 9A-11A), the Board sought enforcement of its decision in the Fifth Circuit Court of Appeals.

The Board before the court of appeals relied upon the decisions in *Quality Manufacturing Co.*, 195 NLRB 197, enforcement denied on this issue, 481 F.2d 1018 (4th Cir. 1973), pending on petition for writ of certiorari, No. 73-765 and *Mobil Oil Corp.*, 196 NLRB No. 144 (1972), enforcement denied 482 F.2d 842 (7th Cir. 1973). (Pet. App. A, p. 3A).

The court of appeals found that there had been no suggestion by the Board that the interview was anything other than a preliminary fact-finding interview and that there was "no evidence that the company sought to deal with the employee about the consequences of her misconduct . . ." (Pet. App. A, pp. 4A-5A).

The court of appeals also adopted the Fourth Circuit's language in *Quality, supra,* that every situation where an employee is directed by a representative of management to cooperate in an investigatory interview carries with it the "implicit threat" of discipline if the direction is not obeyed and that "by necessary implication, Section 7 rights have been at issue in each of these cases." These courts of appeals identified above have observed that it had never been thought, as the Board would attempt to show here, that such Section 7 rights would require any employer to permit the employee's union representative to be present whenever the employee had a "reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions." (Pet. App. A, p. 6A).

The interpretation of the court of appeals *instanter* corresponds with the conclusions of the Fourth and Seventh Circuits in holding that the basic purpose of Section 7 is to permit employees to engage in concerted activities for their mutual aid and protection and that such a need does not arise at an investigatory, fact-finding interview. The court below declared that "to extend the scope of the Act's protection to such preliminary contacts between an employee and his employer would be to apply an overbroad interpretation to section 7."

Thus, three courts of appeals have uniformly held that an investigatory interview is a premature stage at which to invoke a requirement of union representation in the absence of some showing that the interview was for a purpose of not merely eliciting facts concerning employee conduct. (Pet. App. A, pp. 6A-7A).

ARGUMENT

The Board did not file a petition for a writ of certiorari in either *Mobil, supra,* or *Quality, supra.* The decision of the court of appeals that an investigatory interview would be a

premature stage at which to invoke a requirement of union representation in the absence of a showing that the interview was not merely to elicit facts concerning employee conduct is legally sound, and review thereof by this Court is not warranted.

The Board's argument that such conduct is violative of the Act where the employee "reasonably believes that the interview will result in disciplinary action" is subject to the most fundamental suspicion and unchecked fabrication. The theory of the Board in this case rests upon the employee's testimony following the investigation as to her own state of mind and as to the employer's suspected course of conduct subsequent to the interview. The respondent submits that the view of the Board abandons the principles of objective evidence and disregards the realities of industrial life in placing reliance upon a test of subjective "reasonable grounds" in determining if an employer's interview is violative of the Act or is within the permissible limits of its provisions.

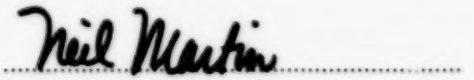
To support the Board's position would create industrial confusion and render an employer guilty of an unfair labor practice on the mere unfounded apprehensions of an employee whose attitude may be extremely hostile to such employer subsequent to (or during) questioning of the employee's suspected work behavior.

Thus, the court below, in considering the reach of Section 7 rights as a whole, correctly determined that the Board did not expressly repudiate prior decisions which either directly or indirectly indicate that no representation need be present in a fact-finding interview and that the requested union representation at an investigatory interview is not the kind of "concerted activity" with which Section 7 is primarily concerned.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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